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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MARILYN and JOHN KRZYWIEC.	
MARILYN KRZYWIEC,	D051169
Appellant,	(Super. Ct. No. DN142022)
v.	
JOHN KRZYWIEC,	
Respondent.	

APPEAL from an order of the Superior Court of San Diego County, Eugenia A.

Eyherabide, Judge. Affirmed.

In this action to dissolve her marriage to John Krzywiec, Marilyn Krzywiec appeals an order denying her request to disqualify John's attorney, Ernest Vogt. She contends that the trial court erred in (1) finding that she did not have a preexisting attorney-client relationship with Vogt and that in any event her motion was barred by laches and (2) not issuing a statement of decision setting forth its specific findings. We find her arguments unavailing and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual and procedural background is taken from the record of the proceedings below and the transcript of a proceeding on John's application for a restraining order against Marilyn; based on Marilyn's request and John's agreement thereto at oral argument in this case, we take judicial notice of that transcript.

After living together and having a son (Kevin) in 1992, Marilyn and John married in July 1998; they had another child, Katelyn in 1999. On May 23, 2006, Marilyn became upset with John and she called the police, who arrested her, although apparently no charges were filed as a result of the incident. (All further dates are in 2006 except as otherwise specified.)

The next day, John applied for, and obtained, a temporary restraining order against Marilyn and requested custody of their children; he was acting in pro per at that time. On May 31, 2006, Vogt filed a petition for dissolution of the marriage on John's behalf, alleging in part that Marilyn had been verbally abusive to John and the children and that she had been diagnosed with anxiety disorder and depression, but had refused to take the medications prescribed for her.

On June 5, Marilyn filed an answer to John's application for a restraining order, denying John's allegations of abuse by her and requesting that she be allowed to return home and gain custody of the children. Marilyn was represented by Attorney Anthony Horaites at that time.

At the hearing on John's application, Marilyn's counsel informed the court of a possible conflict of interest on the part of opposing counsel (Vogt) based on Marilyn's

having contacted Vogt about possibly representing her the week before Vogt became John's counsel. Vogt responded "I would like to reconcile that if I can . . . I did have telephone contact but I didn't have a consultation. So we'll see if we can work this out." Based on this representation, and without any objection from Marilyn or her counsel, the court trailed the matter; upon their return, the parties informed the court that they were "ready" and that had agreed to keep the restraining order in place, again without any objection of the existence of a possible conflict.

The court continued the effectiveness of the restraining order and awarded John physical custody of the children, subject to unsupervised visitation by Marilyn during specified time frames, and ordered him to pay \$1,600 a month in spousal support. On June 16, the court modified the order to require that Marilyn's visitation with the children be professionally supervised. Two days later, Marilyn substituted Attorney William Gamble in as her counsel of record in place of Horaites.

In October, John petitioned the court to modify his support obligation. Shortly thereafter, Marilyn filed a substitution of attorneys indicating that she would be representing herself in the proceedings. Two weeks before the hearing on John's petition, however, Marilyn substituted Attorney Alan Edmunds in as her counsel.

At the hearing on the petition, the parties stipulated to the court's termination of the restraining order and to Marilyn's submission to a psychological examination relating to parenting issues, which the court then ordered. The court deferred the issue of spousal support until the next court hearing, but reserved its jurisdiction to modify spousal support retroactively.

In February 2007, while Edmunds had a motion pending to be relieved as Marilyn's counsel based on a breakdown in the attorney-client relationship, Marilyn again substituted herself in as her representative in the action. Marilyn filed an at-issue memorandum requesting that the family court set the matter for an eight-day custody trial and that it set a separate trial regarding spousal support and property division, on an expedited basis.

In March 2007 Marilyn moved to consolidate all pending matters in a single trial and filed documents objecting to the court's existing orders. In those documents, she argued that (a) the termination of the restraining order against her prejudiced her insofar as she never had the opportunity to prove that it was unfounded and (b) the court violated her constitutional rights to privacy and due process by requiring her to submit to a psychological evaluation and by imposing supervised visitation.

The following month, Marilyn substituted Attorney Robert Barth in as her counsel. With trial scheduled to start in less than two months, Marilyn filed a motion to disqualify Vogt as John's attorney, contending for the first time that she had consulted with Vogt as possible counsel to represent her in this action prior to his undertaking John's representation, that she had disclosed confidential information to him (particularly relating to her mental and psychological health), and that, after undertaking John's representation, he had used that confidential information against her.

John filed a responsive declaration that the issue about Vogt's representation of him was raised in June, but that Marilyn's then-counsel, Horaites, had reported that she was "OK with" the representation going forward. Vogt also submitted his own

responsive papers in which he admitted having consulted with Marilyn over the telephone, but that their conversation was generic in nature and that they never formed a "substantial relationship" as necessary to require his disqualification from representing John. Vogt also contended that Horaites had represented to him that Marilyn did not object to his representation of John and that in any event the significant delay in raising an objection thereto constituted a waiver of the issue.

At the hearing on Marilyn's motion, the court heard sworn testimony from Marilyn and John. Vogt argued that there was no substantial relationship between him and Marilyn and that, in light of the impending trial date, "it would be a hardship" to John to have to start over with a new attorney. Marilyn's counsel argued that because the prior and current representations were linked, the substantial relationship test was met.

Based on the evidence before it and the parties' arguments, the court denied the motion, on two grounds: the absence of a substantial relationship between Vogt and Marilyn and the application of laches. Marilyn appeals the resulting order.

DISCUSSION

1. *Lack of a Statement of Decision*

Preliminarily, Marilyn objects that the family court erred in failing to issue a statement of decision relating to its ruling on the disqualification motion. However, her objection is unavailing, for two reasons. First, Marilyn did not request a statement of decision in the papers she submitted to the court in support of her motion or at the oral argument on the motion, as required under Code of Civil Procedure section 632.

Second, she cites no authority in her appellate briefs to support a contention that that statute requires the court to issue a statement of decision in ruling on a disqualification motion. Moreover, a court is generally not required to prepare a statement of decision as to a ruling on a motion, even if one is requested. (*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1044; *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026.)

For these reasons, the family court did not err in not issuing a statement of decision as to its ruling on the disqualification motion.

2. *Denial of the Disqualification Motion*

A trial court's authority to disqualify an attorney from representing a party to proceedings before it derives from its inherent power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 462.) The issue of disqualification centers on the conflict between a client's right to counsel of their own choosing and the need to maintain ethical standards of the legal profession. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.) We review the trial court's denial of a disqualification motion for an abuse of discretion, viewing the evidence in a light most favorable to the prevailing party and accepting as correct all of the express and implied findings of the trial court supported by substantial evidence. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 322.)

Rule 3-310(C) of the California Rules of Professional Conduct prohibits the concurrent representation of clients in certain circumstances without the informed written consent of each client. That rule provides in pertinent part:

"(C) A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict[.]"

In evaluating alleged conflicts, a court first looks to whether the representation at issue is simultaneous or successive. Where an attorney successively represents one client following the prior representation of another client, the concern is to enforce the duty of confidentiality owed to the former client. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-284.)

Here, the family court found that there was no substantial relationship formed between Marilyn and Vogt during the course of their telephone call. We need not reach the issue of whether the court erred in making this finding because we in any event find that it properly relied on Marilyn's unreasonable delay in seeking relief as an alternative basis for its denial of the disqualification motion.

"In exercising its discretion with respect to granting or denying a disqualification motion, a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation. . . . Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client . . . [t]he burden then shifts back to the party seeking disqualification to justify the delay." (*Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 763-764.)

The mere fact of a delay will not support the denial of a disqualification motion; rather, the delay and the ensuing prejudice to the party opposing the motion must be "extreme." (*Ibid.*)

Here, Marilyn became aware of the fact that Vogt was representing John in this action at its very outset and her attorney raised the issue of a possible conflict at the hearing on John's application for a restraining order. The court trailed the matter for the parties to try to resolve the conflict issue and they returned with a stipulation as to the continued effectiveness of the restraining order, without any further discussion by Marilyn or her counsel of the existence of a conflict. There were various hearings in the ensuing ten months, during which time Marilyn was either represented by counsel (three different attorneys) or represented herself, but neither Marilyn nor her counsel raised any further objection based on a possible conflict until trial was imminent. When the issue was finally raised again, Marilyn contended (as she does on appeal) that every one of the court's prior rulings needed to be set aside, that she should be given the right to return to the house to live and that she should have primary custody of the children.

Based on these circumstances, the court reasonably rejected Marilyn's representations that she had objected to Vogt's representation all along, but that her prior attorneys had refused to take any action to rectify the situation, and impliedly concluded that Marilyn's last-minute motion was instead made for tactical reasons.

Likewise, the court reasonably concluded that the delay and the prejudice to John were so extreme as to warrant a denial of her motion.

DISPOSITION

The order is affirmed. John is awarded his costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.